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Canada. Dept. of Consumer and  
Corporate Affairs

Canadian Library Association  
brief to Hon. Warren Allmand  
Minister of Consumer and Corporate  
Affairs regarding copyright in  
Canada...law.







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CANADIAN LIBRARY ASSOCIATION

BRIEF

to

HON. WARREN ALLMAND

MINISTER OF CONSUMER & CORPORATE AFFAIRS

regarding

COPYRIGHT IN CANADA:

PROPOSALS FOR A REVISION OF THE LAW

by

A.A. KEYES and C. BRUNET

OTTAWA

January 1978



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## Foreword

This Brief is respectfully submitted by the Canadian Library Association as its response to Copyright in Canada: Proposals for a Revision of the Law, by A.A. Keyes and C. Brunet.

Both individuals and institutions are members of the Canadian Library Association. These members are for the most part librarians, libraries and trustees of libraries, principally anglophone, and from all parts of Canada. But membership in the Association is open to other persons and organizations with an interest in library affairs; thus the names of authors, publishers, booksellers, and their associations will be found in the membership rolls. Through its sectional structure, the Canadian Library Association represents and is concerned with every type of library: public, university, college, school, government, and special, the latter term embracing, for example, libraries serving hospitals and businesses.

This Brief, while it represents the official position of the Canadian Library Association on the future revision of the Canadian Copyright Law, speaks also on behalf of the users of libraries. In fact, it is the effects of copyright law on the users of libraries which have been of primary concern to the Canadian Library Association in drawing up this Brief. The present and future users of libraries are indeed the raison d'être of libraries.



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## I. Libraries in Society

To understand the implications of the closing statements in the Foreword to this Brief, one must also have a clear understanding of what is the role of libraries in society.

The institution of the library is an ancient one: it is and always has been a collective established to provide its members with access to information, in the most general sense of that word. In a contemporary democratic society, like Canada's, virtually every citizen is a member of such a collective, and may be a member of more than one. These collectives are supported by their members most commonly through taxation or by the payment of fees; in return, the collections and normal services of these libraries are generally accessible to the members at no direct cost to them. The method of support is sometimes so indirect that users of libraries perceive the service to be free, and to forget that costs are involved.

The function of any library is to acquire, organize, store and make available upon demand a variety of materials suitable to the needs of the members of the collective. In addition to printed materials, such as books and periodicals, this includes to an increasing extent sound recordings, films, videotapes, and the output of computers: in effect, anything that can be imagined to fall within the meaning of "intellectual property." The library retains this material long after it is out-of-print and unavailable from publishers and booksellers; when it is no longer screened in theatres, played on the radio, shown on television. Appropriately, libraries have been called the memory of civilization. The critical importance of libraries to the survival and development of the intellectual life of a country is evident.



Given the nature and function of libraries in society, it follows that the users of libraries must have a two-fold concern in relation to intellectual property: its continued creation on one hand, and access to it on the other. Copyright law touches on both these issues. The Canadian Library Association, reflecting the needs of the users of libraries, fully agrees with the statement of Keyes and Brunet (p.38) that "...the revised act must strike a balance which ensures the continuing availability of sufficient creative efforts to meet cultural objectives while at the same time provides low cost access to information and creative works in such a way that the overall public interest is served." The extent to which the law protects copyrighted works must be tempered by a consideration of the degree to which the proprietary or moral rights of the owners of copyright are threatened, or their impulse to creation discouraged, by the socially beneficial use through libraries of those works.

The Canadian Library Association has studied carefully the text and recommendations of Copyright in Canada, and believes that the authors of that document have come close to finding that critical point of balance. Although there are some points of special concern to the Canadian Library Association and to the patrons of libraries which require further clarification and modification in ways which, in our opinion, will not be detrimental to the interests of copyright proprietors, in general the recommendations meet the double standard of serving the interests of both the creators and consumers of copyrighted materials.

In responding to the individual recommendations, it would have been possible to deal with all of them, and in the same order as they appear in Copyright in Canada. But because many of the recommendations do not bear directly or



beal only marginally on the interests of libraries and their users, another approach has been taken. Those issues, and the recommendations relating to them, which are of primary importance to libraries and their users, are treated first; these issues have been the subject of debate for many years. Then those recommendations which are of less importance but which do have significance for libraries and their users are reviewed in the order in which they appear in Copyright in Canada. Where no comment is made on a specific recommendation, either that recommendation is of minor significance to libraries and meets with the approval of the Canadian Library Association, or it is of no apparent significance to libraries and therefore the Canadian Library Association takes no position on it.

### III. Fair Dealing.

The Canadian Library Association approves of the recommendation on page 149 of Copyright in Canada. This recommendation is in effect a restatement of Section 17(2) (a) of the present Act, adjusted to apply to the use of copyrighted material by the newer media of communication. The Canadian Library Association in earlier submissions to the government advocated the retention of the fair dealing provisions in virtually their present form, and it is gratified that the authors of Copyright in Canada share this view.

The Canadian Library Association agrees with the authors that it is impossible to arrive at a legislative definition of fair dealing which will cover all possible circumstances now and in the future. At the same time, it is essential that the principle be embodied in the law for those specified broad purposes which bear on the flow of information, on the growth of knowledge, and on the creation of new works, namely the purposes of private study, research and criticism. To impede these activities by neglecting to provide for fair dealing in the law would be to grant an absolute monopoly on the use of information to copyright owners, would be to stifle creativity, and to deprive the public of some essential means of access to information.

The Canadian Library Association also agrees with the authors that whether the use of protected material in an individual instance falls within the meaning of fair dealing can only be determined by the courts, where all circumstances can be examined and appropriate criteria applied in arriving at a judgement.

Some will be concerned that the lack of specificity places too great a burden on the judgement of the proprietors and users of copyrighted materials. When



should a copyright proprietor resort to litigation? When should a copyright / user fear litigation? To deal with this uncertainty, the authors of Copyright in Canada have proposed other ways of dealing with those areas where conflicts between owners and users could develop. The Canadian Library Association agrees that this approach is to be preferred, and with the authors' statement (p.149) that "...if it is necessary to provide exemptions for libraries, educational institutions, and other interests, they should be provided by means of specific provisions" and not incorporated in a more specific and detailed provision for fair dealing.

There is one respect in which the Canadian Library Association feels a further provision relating to fair dealing is needed. Although the right of copyright owners to authorize or withhold publication of a work is undeniable, the principle of fair dealing should be applicable to unpublished works held in libraries and archives, at least for purposes of private research and study. A fair-dealing exception for unpublished documents would not entail a loss of revenue for copyright owners, but it would facilitate the work of those engaged in research, that is to say, those who are creating new works. Such a provision could frequently save such creators the time and expense involved in visiting distant archives and libraries; it would save archivists the labour of attempting to locate copyright holders, often an impossible task in connection with old correspondence files. In instances where a donor wished to protect materials from copying, this could be the subject of a special agreement with the repository.

#### IV. Copying and Collectives.

The application of "new technology" to copyrighted materials has been the subject of countless studies, papers and conferences, and, it must be admitted, of much sterile and inconclusive debate between copyright owners and users. There has been little agreement on solutions to problems in this area, or even on the true dimensions of the problems. It seems likely that the amount of copying of protected materials cannot be precisely quantified but only estimated; that the effects of this on the economic interests of copyright proprietors can not be accurately measured; and that there are no available mechanisms, ones which are practical and feasible, for compensating copyright owners in exact proportion to the amount of use made of specific works. If the perfect solution existed, surely it would have been found by now, considering the amount of time devoted to this subject in the past decade alone by lawyers, authors, publishers and librarians throughout the world.

Given this situation, the Canadian Library Association is of the opinion that the authors of Copyright in Canada, in recommendations on pages 165, 166, 214 and 222, have arrived at the best workable solution for Canada's copyright owners and users. Here are those recommendations:

- That photocopying not be the subject of any specific provisions.
- That any new Copyright Act allow, as it does presently, and encourage the formation of collectives to protect authors' and publishers' interests, under the supervision of a government tribunal.
- That the defence of fair dealing be available to a librarian who makes a copy of material for a user if that user also has available to him the



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defence of fair dealing.

- That no further exceptions for libraries be provided.
- That the collective exercise of copyright be encouraged as a means of satisfying the needs of both authors and users.
- That, if any collectives are formed to exercise any right given under a new Act, their regulation, control and review be the responsibility of the appropriate government agency designated.
- That a Copyright Tribunal be created to replace the present Copyright Appeal Board.
- That the Copyright Tribunal, in addition to the responsibilities already imposed on the Copyright Appeal Board, be responsible for:
  - a) establishing the rate for mechanical recording royalties;
  - b) fixing those fees required to be paid by cable systems for rediffusion, and establishing the rules governing assessment, collection and distribution of such fees;
  - c) regulating the collective exercise of copyright with respect to collectives other than Performing Rights Societies: approving licenses, and hearing disputes on contracts, licenses and changes in royalty rates;
- That there be no right of action by a collective against an alleged

user of copyright material unless and until the Tribunal has been notified by the collective of its existence.

- That the Tribunal be given sufficient discretionary powers to enable it to function properly; to determine and establish its own procedures and the means of exercising its powers; and to ensure that royalties are distributed for the purposes for which they are collected.

The Canadian Library Association is prepared to endorse these recommendations, given certain provisos.

The first of these is that the foregoing recommendations should be implemented in toto. They are interrelated and interdependent. Changes to individual recommendations could destroy their coherence as a group and thus alter the nature of the system proposed, in which case the Canadian Library Association would want to reconsider its position, and perhaps call for specific provisions relating to fair dealing.

The second proviso is that if the copyright proprietors, in their briefs, indicate their unwillingness to employ the collective principle, even if it is embodied in law, again the Canadian Library Association might feel obliged to request for libraries exempting provisions covering the copying of protected materials. If the copyright proprietors were to reject the collective principle, it might be an indication that they had concluded that copying in general was not substantially damaging to their interests. Nevertheless, libraries would then feel as uncertain and vulnerable as they do now. A major virtue of the scheme proposed by the authors of Copyright in Canada is that all parties would know their rights and obligations. In the absence of collectives and contractual arrangements with these collectives, libraries



in order to carry out their social mandate would feel the need of protection through legislation.

The third proviso is that either the law, or the regulations drawn up by the Copyright Tribunal, should protect a library from third party prosecution, if that library has entered into a contract with a collective of which that third party is a member.

The fourth is that the Copyright Tribunal should ensure that the collectives will be few in number, and as comprehensive as possible in their representation of Canadian copyright proprietors. A proliferation of collectives will serve no one's interests.

The fifth deals with the composition of the Copyright Tribunal. We would expect that the Tribunal would be composed of impartial copyright experts, representing no interested parties. However, should the Tribunal include in its membership representatives of the copyright proprietors, the Canadian Library Association would request that representatives of copyright users also be included, and that at least one of these should be a librarian.

In addition to these provisos, some observations may be in order, regarding copying in general, copying by libraries, and collectives.

As stated above, the absolute amount of copying of materials protected under Canadian copyright law is not known, and is probably impossible to discover, given the various forms of copying (photocopying, microfiliming, audio taping, videotaping, etc.), and given the proliferation of copying equipment owned or operated by governments, institutions, organizations in the public and private sector, and individual citizens. If the total amount of copying is

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unknown, so is the proportion carried out in or by libraries.

Those studies of photocopying in libraries which have been undertaken suggest that the greatest proportion of copying in libraries is single, not multiple, copying. Much of the material is not copyrighted in Canada. In the case of the material protected in Canada, copyright is not a primary creative incentive for many authors, who might decline to belong to a collective. Such circumstances point to the need for further studies of the actualities of photocopying. The collectives should be obliged to demonstrate to the Copyright Tribunal that the collection systems and rates which they propose will be based on reality, and will be fair and efficient both in collecting payments from users and distributing income to creators. It is obviously in the interests of the collectives and their members on one hand, and those with whom they contract on the other, that whatever systems are developed should be easy and inexpensive to administer.

The collectives should also be encouraged to contract for, or to act as clearing houses for permissions for such library-related activities as poetry readings, film showings, musical concerts, and for such practices as format conversion, as, for example, when for purposes of storage or convenience of use a phonograph record is recorded on tape or a film is dubbed on videotape.



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V. Special Media Material for the Handicapped

The Canadian Library Association is unable to support the position taken by the authors of Copyright in Canada on the subject of exemptions for the handicapped. They have recognized only the principle of remuneration for use. They have not taken into account the distressing state of library service for the handicapped in Canada, and dismissed without adequate consideration the request contained in an earlier submission that social need should be considered in dealing with this particular aspect of the new law.

Thirty thousand Canadians are legally blind, and an estimated equal number are unable to read print because of a visual, physical or perceptual handicap such as cerebral palsy, multiple sclerosis and dyslexia.

Less than 5% of this group can read braille, a highly complex system of raised dots requiring years of practice before fluency is obtained. Among the 3,000 who can read braille in Canada, 600 are deaf-blind. The majority of those who are unable to read print are over 65 years of age.

Commercial publishers in Canada have not produced their books and magazines in braille, large print or recorded form. In all probability they never will, as the "market" for braille is .01% of the population, and the "market" for recorded books is only .26% of the total population of Canada. The production of braille and recorded books is expensive. A small number of copies of thousands of different titles are needed by blind students, by adults employed in a print-dependent work environment, by many who can not read print but who still wish to know the words of authors.

The producers of books in braille, recorded or large print form in Canada are few, mainly charitable organizations supported by private donations, bequests

and small government grants. If required to pay royalties to copyright owners, they will be forced to reduce the number of books available for the blind and handicapped. This cannot be allowed to happen.

Agencies producing books for the handicapped have tried to observe the copyright requirements. Permissions are routinely sought before books are brailled or taped. But obtaining permission is a long procedure, which can often take up to six months. In the case of books being produced for students, this delay can be tragic. There are some arbitrary refusals, and some unrealistic requests for payments. Most publishers, however, are pleased to grant free permissions for the production of limited editions of their books in formats designed especially for the handicapped.

It is therefore requested that a specific exemption be provided in the new Copyright Act for the production by non-profit organizations of books and periodicals in braille, large type or recorded form:

1. If their distribution is restricted to those unable to read conventional print because of a physical handicap;
2. If no charge is made for the distribution of the special format materials to libraries and/or individuals, other than to recover costs of mailing and raw materials.

Such an exemption will do no injury to copyright proprietors. It should be noted that there is an implication in 2. above that permission fees or royalties might be paid if those producing materials for the handicapped are charging for their products.



## VI. Archives

The recommendation that there be a specified term of protection is to be preferred to perpetual protection. However, the Canadian Library Association is of the opinion that the term of protection recommended on p.65 of Copyright in Canada is unnecessarily long.

The Canadian Library Association believes that for unpublished materials, whether or not they have been deposited in a library or archives, a term of protection of fifty years after the death of the author (or, in the case of joint works, the death of the last surviving author) would be reasonable and sufficiently long to dissuade owners from destroying materials. Such a term of protection would be in accordance with Article 7(1) of the Rome Copyright Convention.

The shorter term which the Canadian Library Association recommends would be of undeniable benefit to the creators of new works. It is doubtful that a longer term would have the effect of persuading potential donors to deposit manuscript collections in libraries and archives; in fact, those who own collections of manuscripts frequently do not hold the copyright for components of the collections, and are often unconcerned about matters of copyright. In any case, if a donor desires a longer term of protection, this can be the subject of a contractual agreement with the repository.

One problem not dealt with in Copyright in Canada is that of unpublished public and corporate records. The recommendation concerning the term of protection for unpublished works does not lend itself to the works of corporate bodies, which are not mortal in the human sense. The Canadian Library Association recommends that, for public and corporate records, the term of

protection be for a period of years following the creation of the record, such as fifty years. Whatever the span of time, a term of protection for corporate and public records should be provided for in future legislation.

The Canadian Library Association is not in full agreement with the recommendation on p.175, dealing with exceptions relating to archival activities.

Archivists and librarians have a responsibility to preserve materials in their custody. We believe the recommendation in question should be broadened to include the making of copies for the purpose of safeguarding and preserving original materials as a means of preventing their deterioration or damage. The use of copies of original documents minimizes the use of the originals, which are often fragile. To wait for material to deteriorate or to be damaged or, for that matter, to be stolen, before making a copy for use by the public is analagous to taking out fire insurance after the house has burned down.



VII. Public Lending Right

The Canadian Library Association does not agree with the principle that authors should be legally entitled to compensation for works of theirs which are used in or borrowed from a library. However the Association supports the creation of a government fund to increase financial rewards to Canadian life and culture. The Association would support development of a system which would use library holdings data if necessary to arrive at an equitable distribution of such a fund to Canadian authors. The Canadian Library Association supports the recommendation on p.123. [A full statement on the CLA position on the matter of a Public Lending Right will be submitted to the Minister with this Brief.]

VIII. Other Aspects of Copyright Affecting Libraries.

Fixation

The recommendations on p.42 are approved.

Qualified Persons

The recommendations on p.45 are approved.

Published and Unpublished Works

The recommendations of p.46 are approved.

Categories of Works and Definitions

The recommendations on p.48 are approved, but a clearer definition of "photograph" is necessary, since most photocopying is accomplished "by a process analogous to photography".

Pecuniary Rights

Recommendations 1, 2 and 3 on p.53 are approved. However, any revision of the present Act should continue to provide the copyright owner with the right to translate or authorize the translation of his works.

Recommendation 4, p.53 is not approved, because it would exclude the exhibit in public by libraries and bookstores of artistic works which are contained



## Moral Rights

In recommendation 1, p.59, the Association would like it to be understood that the word "circulation" used in 1(a) and 1(d) refers to the sale and distribution of copies of a work and not the lending of them from a library, and also that it refers to the first sale of material under copyright and not to its resale.

In reference to 1(a), when the real name of an anonymous or pseudonymous author has become public knowledge, the right to restrain the sale or distribution of a work should no longer apply.

The recommendations on p.59 are approved, contingent on the above changes and clarifications being made.

## Terms of Protection - Works Published during the Author's Lifetime

The recommendations on p.63 are approved.

## Ownership of Copyright

Recommendation 2, p.71 is not approved. The Association believes that copyright ownership of a photograph should belong to the person who fixed the photograph taken, provided there is no contractual arrangement to the contrary.

Recommendations on p.73, 76 and 78 pertaining to The Exercise of Ownership of Copyright are approved, but the Association would like to have consideration given to the retention of a compulsory licensing provision for the transcription of works for the handicapped, where the sale of such a transcription is envisaged.

### Cinematographic Works

The recommendations on p.81, 82 and 83 are approved.

### Sound Recordings

The members of the Association have an interest in promoting, collecting, and circulating oral history recordings. Concern has been expressed in regard to recommendation 3.3 on p.89 and the lack of copyright protection provided for the person or persons providing the material for an oral history recording or even a lecture taped in a lecture hall or classroom. We believe such persons should be protected in the absence of any formal agreement or contract.

Except for this reservation, the recommendations on p.89 are approved.

### Computer Programs

The recommendations on p.111 are approved.

### Published Editions of Certain Works

The recommendations on p.112 are approved.

### Performances by Performers

The recommendations on p.117 are approved, with the reservation that the rights of native people as performers should be protected when ethnological recordings are being made.



### Use of Copyright Material in ISRS

The Association recommends that a definition of an "Information Storage and Retrieval System" be included in the Act, so as to ensure that it refers to a computer-based ISRS only.

The recommendations on p.129 are approved, with the above addition.

### Summary Remedies

The recommendation on p.187 is approved.

### Civil Remedies

The recommendations on p.193, 194 and 195 are approved.

### Importation Provisions

The recommendations on p.203 are approved.

### Periodic Revision and Consultation

The Association wishes to stress the importance of independent continuing research into the amount and effect of consumer use of copyrighted material, the analysis of the research, and the presentation to government of the results.

The recommendations on p.233 are approved.

• Crown Copyright

While the Association approves of the recommendations on page 226, it wishes to stress that in asserting its copyright the Crown should do nothing to impede access to public information.



IX. Summary of Recommendations

In the foregoing pages, various recommendations made in the working paper have been discussed, commented upon, approved and disapproved. It is essential that anyone wishing a full understanding of the position of the Canadian Library Association in respect to the revision of the Canadian copyright law read the whole text. What follows is only a list of the Association's recommendations which call for changes to or additions to the recommendations made by Keyes and Brunet.

(p.5) That the principle of fair dealing should be applicable to unpublished works held in libraries and archives, at least for purposes of private research and study.

(p.6-8) That the recommendations on pages 165, 166, 214, and 222 of the working paper should be implemented in toto.

(p.8) That if copyright proprietors fail to advocate or employ the collective principle, specific exemptions for the copying of protected materials be provided for libraries.

(p.9) That the law, or the regulations, protect a library from third party prosecution, if that library has entered into a contract with a collective of which that third party is a member.

(p.9) That the Copyright Tribunal should ensure that the collectives are few in number, and as comprehensive as possible in their representation of Canadian copyright proprietors.

(p.9) That if the Copyright Tribunal includes in its composition representatives of the copyright proprietors, it should also include representatives of the copyright users, one of whom should be a librarian.

(p.10) That the collectives be obliged to demonstrate to the Copyright Tribunal that the collection systems and rates which they propose will be based on reality, and will be fair and efficient both in collecting payments from users and distributing income to creators.

(p.10) That the collectives should also be encouraged to contract for, or to act as clearing houses for permissions relating to a variety of library uses of copyrighted material, in addition to photocopying.

(p.12) That there be a specific exemption for the production by non-profit organizations of books and periodicals in braille, large type, or recorded form:

1. If their distribution is restricted to those unable to read conventional print because of a physical handicap.
2. If no charge is made for the distribution of the special format materials to libraries and/or individuals, other than to recover costs of mailing and raw materials.

(p.13) That the term of protection for unpublished materials, whether or not they have been deposited in an archives, be fifty years after the death of the author, or, in the case of joint works, fifty years after the death of the last surviving author.

(p.13) That a term of protection for public and corporate records be specified in the Act, based on the period of years following



the creation of a record, such as fifty years.

- (p.14) That the statutory exception recommended on p.175 of Keyes and Brunet be broadened to include the making of copies for the purpose of safeguarding and preserving original materials, as a means of preventing deterioration or damage.
- (p.16) That a more specific definition of "photograph" be given.
- (p.17) That the word "circulation" be defined as referring to the sale and distribution of copies of a work, and not the lending of them from a library; and that it refer to the first sale of material in copyright, and not to its resale.
- (p.17) That when the real name of an anonymous or pseudonymous author has become public knowledge, the right to restrain the sale and distribution of work should no longer apply.
- (p.18) That copyright ownership in a photograph belong to the person who fixed the photograph taken, providing there is no contractual agreement to the contrary.
- (p.18) That consideration be given to a compulsory licensing provision for the transcription of works for the handicapped.
- (p.19) That a definition of an "Information Storage and Retrieval System" be included in the Act, so that it is clear that it does not refer to a library per se, but to a computer-based ISRS.

• (p.20) That is asserting its Copyright the Crown should nothing to  
impede access to public information.



# BACKGROUND DOCUMENTATION

## COPYRIGHT IN CANADA: PROPOSALS FOR A REVISION OF THE LAW

### SOURCE OF THE PAPER

The paper proposing revisions to Canadian copyright legislation was prepared for the Bureau of Intellectual Property by consultants, following discussions and consultation with the private and public sectors and the consideration of briefs submitted to the Department. It is the third in a series as part of a program to update and revise intellectual property legislation on patents, trade marks, copyright and industrial design.

### STATUS OF THE PAPER

The study presents recommendations for revising the law. The recommendations are not governmental or departmental policy. The government may, in response to reaction, adopt a viewpoint for copyright law revision varying significantly from the proposals of the paper.

Although it contains specific recommendations for revision, they are presented in order to elicit debate and reaction on the fundamental policy and substantive issues involved, as well as the technical structure of the law.

A major consideration is that the complexity and sensitivity of the issues require thorough airing and discussion before solutions based on compromise can be reached. Thus, a draft law can only be devised after reaction to the paper is received.

### COPYRIGHT DEFINED

Copyright consists of a bundle of exclusive rights, provided by statute, to do, and to authorize the doing of, certain acts in relation to protected material for a specified period of time, usually the life of the author and 50 years thereafter. The law protects the literary, dramatic, musical and artistic works of creators from being copied, performed, broadcast or adapted. These rights are divisible (by media, use, time or territory) and may be sold or licensed accordingly.

The scope and nature of copyright has changed over time because of technological change and social development. Originally reflective of a printing press technology, the principles of copyright require adapting to a communications technology.



## HISTORICAL BACKGROUND

The last revision of the copyright law occurred in 1921, and Canada's present Copyright Act came into force on January 1, 1924. The law, solely within federal jurisdiction, is largely traditional in form, providing an author and his or her heirs with 50 years of copyright protection after the author's death. The existing Canadian law was closely modelled on the law of the United Kingdom.

Efforts to revise Canada's copyright law have been sporadic: the Ilesley Royal Commission published a report in 1957 proposing Canada adopt a law along the lines of the U.K. Act of 1956. In 1966, (while the Ilesley proposals were being reviewed) the federal government requested the Economic Council to study intellectual property law, including copyright, in the light of long-term economic objectives.

When the Economic Council's Report on Intellectual and Industrial Property was issued in 1971, it dealt in detail with the economic rationale of a copyright law. It made major proposals that attracted considerable attention.

The Economic Council stressed the economic importance of copyright, changing technology and international trade. The Council emphasized the net-importer status of Canada and the non-discriminatory nature of the international copyright conventions.

The Council stressed the need to secure for creators returns for the use made of their material, but found no evidence to justify substantial increases or decreases in levels of protection, except for lateral extension for new media.

It is against the background of these developments that this paper has been prepared.

## GENERAL CONSIDERATIONS

The first part of the paper provides a context for revision. On the basis of a general review of the background facts and issues relevant to the copyright issues, the fundamental issue of what the extent and scope of a new copyright law should be is raised.

The paper suggests that it would be unrealistic to extend the scope of Canadian copyright law, without considering the costs and benefits of each change.

Canada currently allows foreign participation in its copyright law as part of its obligations under the international copyright conventions, on the assumption that Canadians are benefitting by obtaining protection abroad. Statistics given in the paper, suggest that royalties generated in Canada are, in great measure, leaving the country. The net importer status of Canada is a prime determinant of the extent to which changes can be envisaged in domestic law.

The paper concludes that it would not be in Canada's interest to accede to later texts of the international copyright conventions, which impose greater obligations resulting in an even greater outflow of royalties.

Within the larger international constraint the paper provides a rationale for revision of the copyright law, by taking into account the reasons for revision: technological developments, antiquity of the law and the emergence of new rights and new subject matter.

#### GENERAL APPROACH OF THE PAPER

Certain major areas of concern have been identified in the paper: (i) the polarization between those advocating increased protection and those seeking easier, and perhaps free, access to copyright material; (ii) the effects of technology which have created new uses and new "rights" for protected material; (iii) the necessity of striking a balance among conflicting interests; (iv) the concomitant need to regulate and control the exercise of copyright in Canada.

It is self-evident that without a sufficient degree of protection, creative activity may decline, but where there is insufficient regulation of the exercise of exclusive rights, the public may be subject to unwarranted restrictions. The difficulties lie in attempting to reach an equitable balance.

In general, the recommendations in the paper envisage that the rights of creators will not increase nor will the exceptions to the rights of creators be increased measurably. The paper, however, does recommend the deletion of certain exceptions on various grounds.

The unfettered exercise of copyright on an individual basis, appropriate for an age prior to communication technology, may no longer be entirely appropriate. Accordingly, recommendations are made to enable the collective exercise of copyright, thereby according users easier access to copyright material and providing creators an easily determined royalty fee.



Collectives, exercising rights of individuals, are also urged as being an answer to the demands of owners that the state police their rights. Moreover, the establishment of collectives will hopefully reduce materially the complaints of users with respect to the difficulties of achieving access to copyright material.

The collective exercise of rights, with a system of royalty fees arrived at through licences, indicates that it would be possible to arrange for a large degree of accommodation between the impact of technology and the preservation of authors' rights. Thus, it would be possible to preserve the exclusive economic and moral rights of creators and, at the same time, accommodate the effects of technology.

In such a system a regulatory mechanism is necessary: to hear sides, set rates and conditions. The proposed regulatory mechanism, the Tribunal, would, in addition to its regulatory function, have a reallocative effective in ensuring royalties are distributed to those for whom they are generated, whether by collective or compulsory provisions.

#### THE MAIN ISSUES OF REVISION

In large these have been identified as:

1. the confrontation between those seeking increased and longer protection, and those who wish to have less protection and easier access to copyright material; i.e. the extent and scope of rights
2. the effects of technology and social change, which have created new uses for copyright works and demands for new rights, for instance: cablevision, computer storage and retrieval, public lending right, performers' rights;
3. the extent to which it will be necessary for the government to regulate and control the exercise of copyright in order to reach an equitable balance among conflicting interests.

Certain conclusions are derived in the paper which are formulated as general recommendations:

1. That Canada remain at the present level of international participation in respect of the Berne Convention and the Universal Copyright Convention.

2. That Canada should, however, maintain the present level and extent of protection, taking into account social and cultural developments and, in particular:
  - a) opposing forces and views: i.e., to provide greater access to copyright material, yet increase the share of creators and authors in copyright returns; and to have regard for the interests of entrepreneurs as well as those of users (consumers) on an equitable basis; and
  - b) need to extend the scope of protection laterally to encompass new subject matter, new use of material, and associated matters.

These general recommendations are the central features of the study.

#### STRUCTURE OF THE PAPER

The paper is divided into four major parts and a conclusion:

Part I contains a background review of reasons and necessity for revision. It concludes by suggesting that Canada should maintain a law consistent with Canadian needs.

Part II presents an exposition and analysis of the economic magnitude and significance of copyright.

Part III applies the principles adduced in Part I to the particulars of a copyright law.

Part IV is devoted to administrative and regulatory matters.

#### SUMMARY OF THE PAPER

##### PART I

Part I identifies and discusses the need for revision, the function of copyright, the context of revision and the approach taken. It has as its purpose the presentation of a factual and philosophical background against which the basic questions concerning the context and scope of a copyright law can be raised.

The nature of copyright and its origins are summarily discussed, followed by a consideration of the changing importance of copyright within the Canadian experience. The Economic Council Report is reviewed in terms of its relevance and applicability to law revision, followed by a review of the main reasons for revision of the law: technological developments, the increasing antiquity and non-relevance of the law, and changes in social consciousness.

Part I emphasizes that the extent to which the scope of copyright owners' rights are limited, reflects, in part, a social balance of competing claims and interests. While creation and innovation must be rewarded, if not actively encouraged, the broad public interest must be taken into account.

The national elements to be taken into account in revising the law are diverse: the "copyright industries," e.g. publishing, broadcasting, film, recording; the creative community of authors, artists, composers; the intermediate agents of creators such as the performing rights societies and unions; consumers and organizations of users of copyright. Added to this mix are the effects of government policy in the areas of culture, communications and the arts; the impact of international trade; the social and economic aspects of technological development and innovation.

Certain basic principles are postulated to assist in determining the general position Canada should adopt with respect to a Canadian copyright law, i.e. Canada should strive to provide a milieu within which the development of national identity, taking into account economic development, can be fostered, but consistent with resources and the maintenance of cultural sovereignty.

Considerable emphasis is placed on the constraints imposed upon the degree of flexibility that can be exercised in revising the law. These constraints centre upon Canada's net-importer status. Of equal importance are the constraints imposed by the international copyright conventions, which dictate the minimum level of protection, in respect to convention subject matter, that must be provided in national law.

However, Part I points out that while the conventions restrict freedom of action, they do so only with respect to the subject matter required to be protected by those conventions. Whereas protection of "convention" matter must be on a basis of non-discrimination, material which is not required to be protected by the conventions can be protected by national law and solely for the benefit of Canadian creators. The extension of that protection to foreigners can be done on a basis of strict reciprocity, as necessary. Thus, the paper follows a course adopted in other countries, notably the United Kingdom, Australia and the USA.

Part I concludes with a summation and a statement of the main issues around which revision will coalesce. It is stated that Canada should maintain the present general level and scope of protection, while taking into account the impact of technology, the conflicting needs of creators, users and consumers, and the need for regulation and control of the exercise of copyright.



## PART II

Part II establishes the economic importance of copyright, defines the copyright industries and the income generated by reason of the copyright law. Copyright industries contributed an estimated 1.7 billion dollars to the 1971 real gross domestic product. Part II incorporates an analysis and exposition of the economic significance of copyright and the effects of the rights accorded to nationals and those others who benefit from the law.

The paper suggests that it would be unrealistic to simply extend the scope of Canadian copyright law without considering the effects, as any increase can only benefit foreign owners. Canada currently allows foreign participation in its copyright law as part of its obligations under the international copyright conventions, on the assumption that Canadians are benefitting by obtaining protection abroad. Statistics demonstrate that royalties generated in Canada, are, in great measure, leaving the country, thus confirming that Canada is a net-importer of copyright material. Therefore, it is not in Canada's interest to accede to later texts of the international copyright conventions, as later texts impose greater obligations.

## PART III

Part III applies in specific terms to particular issues, the general considerations derived from the discussion in Part I.

It uses the major distinction made in Part I by considering the protection of material required by the copyright conventions: Convention Material. This is followed by an examination of what protection should be accorded "non-convention" material. It then considers what "new rights" might be accorded to convention material. Finally, Part III reviews matters common to all protected subject matter.

### (a) Convention Material

These are the traditional subjects of protection, original literary, dramatic, musical and artistic works, (e.g. books, plays, pop songs, sculpture and painting) and no fundamental change is recommended. The treatment of original works embraces their definition, conditions of acquiring copyright, and with the pecuniary or exploitative rights to be given to creators. The non-pecuniary rights of authors, the doctrine of moral rights, or droit moral, are examined and are the subject of a recommendation to recognize their importance and give them equal weight with pecuniary rights.

With respect to the duration of copyright it is proposed that, in general, as to published works it remain largely unchanged: life of the author and 50 years thereafter, for original works. Certain variations of the rule are necessary. It is, for example, proposed that the measurement of the term of 50 years after the death of the author should be computed not from the date of death, but from the end of the year in which death took place.

In respect of literary, dramatic and musical works not published before the death of the author, it is proposed that the present perpetual term be reduced to 75 years after death.

With regard to ownership of copyright it is recommended that the present provisions be retained: that the author is the owner of a copyright in the work, except where works are made under a commission, or during the course of employment. The exercise of copyright ownership is clarified with a clearing away of limitations, mainly of compulsory licences, a reversionary provision, and out-moded printing clauses. The principle and scope of the rights of authors to assign and licence copyright are elaborated and maintained without fundamental change, except the elimination of the right to divide markets in Canada by territory.

Part III then deals with the protection accorded cinematographic works (motion picture films) and recommends substantial changes. It is proposed to provide separate and particular protection for motion picture films and to assimilate videotape to motion picture film for purposes of copyright protection.

#### (b) Non-Convention Material

Part III then takes up the question of protection of material which the copyright international conventions do not require to be protected: sound recordings, broadcasts, computer programs, published editions of certain works, performers' rights. The recommendations made involve substantial changes in the existing law.

It is proposed to provide protection to sound recordings in accordance with the particular requirements for protection of such subject matter. A performing right (not presently provided) is to be provided only to Canadian sound recordings. In respect of the present compulsory licence presently available to record manufacturers, (i.e., a statutory licence to make a recording of a musical work once the work has been recorded with the consent of the copyright owner) certain changes are proposed. The conditions precedent and subsequent to the granting of the licence would be changed, the scope of the licence reduced, and the method of calculating royalties changed from that of a fixed rate to a percentage, variable at the instance of the (proposed) copyright tribunal.

Protection (new) is recommended for broadcasts in themselves in addition to the protection afforded to the material being broadcast. Protection for computer programs by copyright means is not recommended at this time pending further review.

Protection is recommended for a new category of material, that of published editions of material no longer protected by copyright. Modern printing methods have made it easy to copy published editions of a work and it is considered that there should be protection against a copier reproducing the edition.

Finally, it is recommended that performances of performers be protected, but with the right being restricted to Canadian performers, subject to certain qualifications concerning the operation of the right.

#### (c) Other "Rights"

The paper then takes up the further uses of protected materials that are "new" and relate to works protected by the Conventions: for example a public lending right and a droit de suite: a fee for each loan of a book; participation by an artist in results of his work. Recommendations are made not to provide such "new" rights by copyright law for reasons centering upon Canada's net-importer status. With respect to information storage and retrieval systems a limited degree of protection is recommended.

In respect of cablevision, specific recommendations are made for the payment of copyright royalties in certain instances and in particular cases: for origination of programs and for simultaneous rediffusion of Canadian broadcasts.

#### (d) Matters Common to All Protected Matter

Exceptions from exclusive rights are treated in detail. It is not proposed to enlarge the scope of exceptions beyond present limits, except to adapt them to modern methods of use and technical adjustments.

With respect to photocopying, it is recommended no specific changes be made in the law, it being proposed that collective agencies be used to licence those photocopying. This will render it unnecessary to make provisions in the nature of unwarranted exceptions to the right of reproduction.



A number of existing exceptions are the subject of recommendations for modification or deletion, including those dealing with the free use of music at agricultural fairs, or during the course of charitable, religious or similar proceedings. Recommendations are made to permit broadcasting organizations to record or to include in a film (videotape) a copyright work which it is authorized to broadcast, without additional payment to the copyright owner. Such a recording may be used only for the purpose of broadcasting. It is recommended that the present exemption which permits an exemption from paying royalties for the performance of music by juke boxes be repealed.

With respect to infringement of copyright those acts constituting infringement will differ in only minor respects from the new provisions of the existing law. With respect to remedies in a new act recommendations are made to abolish summary remedies on the grounds that the state should not police private rights and the deterrent effect can be achieved by civil remedies. An increase in civil remedies is proposed, together with necessary changes in presumptions.

In the matter of infringement by importation certain basic changes are proposed in the present administrative provisions. It is recommended the present duty and responsibility laid upon Revenue Canada to police certain private rights of owners of copyright i.e. to enforce a ban upon the importation of certain works upon request, be eliminated. The basic provisions in the act, where importation is an infringement, have been retained.

#### PART IV

Part IV, while concerned primarily with administration of copyright policy and important regulatory aspects, is of significant importance.

The efficacy of the present optional registration system is examined and recommendations are made for its abolition. One ground for abolition is it is not for the state to maintain detailed legal records to enable owners of registration certificates to enforce their rights in court, according to the presumptions created by a registration certificate.

A major solution advanced to the problems of access is that the rights granted by copyright can be exercised collectively to (i) provide a means of securing remuneration to authors and (ii) whereby potential users can secure permission to use material more readily. However, if collective mechanisms are formed, their control and regulation will be necessary to ensure equity between owners and users and protect the public interest, as is presently the case with respect to performing rights' societies. Hence, a recommendation is made to form a regulatory body, a tribunal. Various regulatory duties and responsibilities have been identified in the paper. To provide an equitable balance between owner and user, the establishment of a copyright tribunal is urged, to regulate, for instance, the collective exercise of copyright.

The question of crown copyright, primarily from the point of view of the federal government, is reviewed and recommendations are made that the crown be subject to the copyright law and that the federal government review its interests in crown copyright. Consideration of Canada's accession to international conventions, other than those of which Canada is presently a member, results in recommendations that Canada accede to international agreements covering sound recordings, satellite signals, but not to those agreements covering neighbouring rights or type-faces.

Part IV concludes with a consideration of the need for periodic review of the law and consultation with affected interests.

Recommendations are made for continuing review and periodical assessment of the adequacy of the law, in accordance with the Economic Council's characterizing of the issues arising in copyright law as "rapidly moving targets". It follows that review is necessary to ensure balance in the public interest.

## CONCLUSION

In the paper, the public interest is widely construed to take into account the social and economic pressures resulting from technological development and increasing social awareness of the importance copyright plays in the everyday lives of people.

The overall public interest may best be served by recommending, on one hand, a series of changes which defines with more certainty the rights of creators, and which ensures the interests of consumers and users, while, on the other hand recommending that Canada not adhere to later texts of the copyright conventions, thus not increasing unnecessarily the general levels of protection for foreigners.



The paper stresses that the relative importance of copyright may change, but the basic conflict remains: the need to encourage, nurture and reward intellectual creativity as opposed to the needs of society in terms of access to copyright material. The conflict requires resolution by finding the appropriate balance. Attention has been drawn to the wide variety of complex areas involving separate interests within the public and private sectors. Those areas and the problems created by technology, the demands of creators and the interests of the public, coupled with the responsibilities to be met by government, require the development and maintenance of mechanisms for reaching and maintaining equilibrium.



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